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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JAMES DUGUID AND BERTHA V. DUGUID,
Petitioners

v.

RAYMOND R. BEST, as State Supervisor, Bureau of Land Management, et al., Department of the Interior,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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James Duguid and Bertha V. Duguid, Petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on May 25, 1961.

OPINIONS BELOW

The opinion of the Court of Appeals is reprinted as Appendix A hereto, p. 12. The Court's unreported order denying the petition for rehearing is annexed hereto as Appendix B, p. 24. The District Court filed a Memorandum and Order on June 10, 1960, annexed hereto as Appendix C, p. 25, and entered a Judgment on June 22, 1960, which is annexed hereto as Appendix D., p. 29.

JURISDICTION

The judgment of the Court of Appeals was entered on May 25, 1961. A petition for rehearing was denied without opinion on June 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1245(1).

QUESTION PRESENTED

Whether the Bureau of Land Management of the Department of the Interior may assume quasi-judicial jurisdiction to hear and determine a private contest involving the right of possession of a mining claim when a possessory action is already pending in a State Court having jurisdiction over the same parties and the same subject matter.

STATUTES INVOLVED

R.S. Sec. 2319; Feb. 25, 1920, c. 85, Sec. 1, 41 Stat. 437; 30 U.S.C. Sec. 22.

R.S. Sec. 2322; 30 U.S.C. Sec. 26.

Act of March 3, 1881, c. 140, 21 Stat. 505; 30 U.S.C. Sec. 32.

R.S. Secs. 2329, 2331; Mar. 3, 1891, c. 561, Sec. 4, 26 Stat. 1097; 30 U.S.C. Sec. 35.

R.S. Sec. 2330; Mar. 3, 1891, c. 561, Sec. 4, 26 Stat. 1097; 30 U.S.C. Sec. 36.

R.S. Sec. 2332; 30 U.S.C. Sec. 38.

R.S. Sec. 910; 30 U.S.C. Sec. 53.

STATEMENT OF THE CASE

Petitioner's mining claim, known as "Clifford Mine," was located July 5, 1936 within the Lassen National Forest, and duly recorded in the official records of Butte County, California. Ever since the date of location, petitioners fully complied with the provisions of the applica-

ble mining laws and were in constant possession of the mining claim.[1]

On March 26, 1956, Paradise Irrigation District obtained a special use permit from the United States Forest Service to construct a dam and reservoir at specified locations within the Lassen National Forest. This permit was granted with the express condition that it was "subject to all valid claims". Subsequently, Paradise Irrigation District, without petitioners' consent, forcibly took possession of a portion of petitioners' mining claim and location and proceeded to construct a dam and spillway upon it.

Thereafter, on May 19, 1959, petitioners instituted a possessory action against the Irrigation District in the Superior Court of the State of California, in and for the County of Butte.[2] In their complaint petitioners alleged that the Paradise Irrigation District, without their consent, forcibly entered and took possession of approximately 3.7 acres of petitioners' mining claim, removed 55,000 cubic yards of gold bearing gravel, and built a dam and spillway on their mining location. Petitioners prayed for damages in the sum of $30,000 for such taking. This action is still pending and undetermined in the State Court.

On February 9, 1960, while petitioners' action was pending against it in the State Court, Paradise Irrigation District filed a complaint against petitioners, as a private contest, in the Sacramento Land Office of the Bureau of Land Management of the Department of the Interior.[3]

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[1] Texts of applicable mining laws are contained in Appendix E, p. 31.

[2] See Appendix F, p. 34.

[3] See Appendix G, p. 40. An earlier complaint by the Irrigation District, dated February 1, 1960, was dismissed by the Bureau due to formal deficiencies.

The Irrigation District alleged that petitioners' mining claim was non-mineral in character; that the minerals in the mining claim were insufficient to constitute a discovery; and that the dam and spillways constructed by the Irrigation District on petitioners' mining claim caused no damages to petitioners in any way. The Irrigation District, in its complaint, specifically directs the attention of the Bureau of Land Management to the pending action between the petitioners and the Irrigation District in the State Court and states "* * * the issues involved in the contest before the Bureau of Land Management are the same as involved in this action * * * (in the State Court)."

Despite the knowledge that suit was already pending in a State Court, involving the same parties and the same subject matter, the Bureau of Land Management assumed jurisdiction to hear and adjudicate the complaint initiated by the Irrigation District and ordered the petitioners to appear before it.

Thereafter, on March 16, 1960, petitioners filed suit in the United States District Court seeking to enjoin the Bureau's proceedings. Petitioners asserted in their complaint that the Bureau's action was without statutory authority; that it would subject them to a multiplicity of suits; and that the same parties and the same issues were already within the jurisdiction of the State Court where suit between the parties was pending and undetermined.

By order and memorandum dated June 10, 1960, the District Court granted the Bureau's motion for summary judgment and held that the Bureau of Land Management was acting within its authority in conducting proceedings initiated by complaint of the Paradise Irrigation District.

On appeal, the Court of Appeals for the Ninth Circuit sustained the District Court's dismissal of petitioners' complaint.

In its opinion sustaining the District Court, the Court of Appeals stated:

> "The main question on this appeal is whether the District Court erred in concluding that the appellees had authority to hear and determine the administrative proceedings initiated by the irrigation district."

Applying the decision of this Court in *Cameron* v. *United States*, 252 U.S. 450 (1920) to the instant case, the Court of Appeals held that the Department had authority to hear and determine the proceedings initiated by the Irrigation District under the powers vested by the Congress in the Secretary of the Interior to exercise general supervisory authority over public business relating to public lands, including mines. However, the decision of the Court of Appeals, also recognizes and underscores the jurisdiction of the State Court to determine the possessory interests as between the petitioners and the Irrigation District when it states:

> "In exercising jurisdiction to determine the possessory interests as between appellants and the irrigation district, the state court may be required to determine the mineral or non-mineral character of the land and the question of whether discovery has been made, where such a determination is necessary to settle the controversy before it. See *McLemore* v. *Express Oil Co.*, (1910), 158 Cal. 559; *Double Eagle Mining Co.* v. *Hubbard*, (1910), 42 Cal. App. 39 * * *"

In their petition for rehearing in the Court of Appeals petitioners stated that the *Cameron* case, *supra*, was inapplicable; that the instant case was governed by the possessory right statute, (30 U.S.C.A. 53), and by the opinion of this court in *Gauthier* v. *Morrison*, 232 U.S. 452, 461 (1914) which stated that the Land Department:

> "* * * has not been invested with authority to redress or restrain trespassers upon possessory rights or to restore the possession to lawful claimants when wrongfully dispossessed. Congress has not prescribed the forum and mode in which such wrongs must be

> restrained and redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public land states, but also recognized and approved by this court. (cases cited)".

In its petition for rehearing, moreover, petitioners' re-emphasized that suit between them and the Irrigation District was pending and undetermined in the State Court which had jurisdiction over the same parties and the same issues prior to the assumption of jurisdiction by the Bureau of Land Management.

Petitioners' petition for rehearing was denied by the Court of Appeals on June 15, 1961.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in conflict with 30 U.S.C. 53, and with the decisions of this court in *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U.S. 683, 694 (1895); *Harkrader* v. *Wadley*, 172 U.S. 148, 163 (1898); and *Farmer's Loan & Trust Co.* v. *Lake Street Elevated Railroad Co.*, 51, 60 (1900) which prohibit a federal judicial agency from assuming jurisdiction over any matter where prior jurisdiction of a State Court has attached and until such time as the State Court has fully performed its duty and exhausted its jurisdiction.

NATURE OF PETITIONERS' PROPERTY RIGHTS IN THEIR MINING CLAIMS

As stated above, petitioners' mining claim was located July 5, 1936 and duly recorded in the official records of Butte County, California. The rights of mining claimants and the character of the title to such mining locations has been described by this court in *Wilbur* v. *United States Ex Rel. Krushnic*, 280 U.S. 306, 316 (1930) as follows:

"The rule is established by innumerable decisions of this Court, and of state and lower Federal courts, that when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of the term; and it may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the State; and is 'real property' subject to the lien of a judgment recovered against the owner in a State or territorial Court. (cases cited). The owner is not required to purchase the claim or secure a patent from the United States; but so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent. While he is required to perform labor of the value of $100 annually, a failure to do so does not *ipso facto* forfeit the claim, but only renders it subject to loss by relocation. And the law is clear that no relocation can be made if work is resumed after default and before such relocation."

PETITIONERS' RIGHT TO BRING ACTION AGAINST IRRIGATION DISTRICT IN STATE COURT

As stated above, on May 19, 1959, petitioners instituted a possessory action against the Irrigation District in the Superior Court of the State of California, in and for the County of Butte.

This action was instituted in the State Court by petitioners in accordance with 30 U.S.C.A. 53 which provides:

"No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

That petitioners resorted to the proper forum in instituting their possessory action against the Irrigation District in the State Court is conceded by the opinion of the Court of Appeals in the following language:

> "We are satisfied from our review of the authorities and the provisions of Section 53, Title 30 U.S.C.A., *supra*, that appellants resorted to the proper forum in instituting their action in the Superior Court of the State of California, in and for the County of Butte, against the irrigation district to recover damages for the alleged trespass of the irrigation district on the possessory interest of appellants in the mining claim. Under the express language of said Section 53 the paramount title of the United States to the land in which such mining claim lies is not affected by such lawsuit, and the rights of the parties to such lawsuit must be adjudged by the law of possession. We recognize that there is a dispute between the parties as to the nature of appellants' possessory interest . . .
>
> "In exercising jurisdiction to determine the possessory interests as between appellants and the irrigation district, the state court may be required to determine the mineral or non-mineral character of the land and the question of whether discovery has been made, where such a determination is necessary to settle the controversy before it. (cases cited)"

The jurisdiction of a State Court to adjudicate a possessory action initiated by a mining claimant has been set forth by this Court in *Gauthier* v. *Morrison*, 232 U.S. 452, 461, 462 (1914) as follows:

> "Generally speaking, it also is true that it is not a province of the courts to interfere with the Land Department in the administration of the public land laws, and that they are deemed in process of administration ~~they are deemed in process of administration~~ until the proceedings for the acquisition of the title terminate in the issuance of a patent. But no interference with that department or usurpation of its functions was here sought or involved. It has

rot been invested with authority to redress or restrain trespasses upon possesory rights or to restore the possession to lawful claimants when wrongfully redressed, as doubtless it could, but has pursued the policy of permitting them to be dealt with in the local tribunals according to local modes of procedure. And the exercise of this jurisdiction has been not only sanctioned by the appellate courts in many of the public land States, but also recognized and approved by this Court., (Cases cited). It was well said by the Supreme Court of Oklahoma in *Sproat* v. *Durland*, *supra:*

> "'To say that no relief can be granted, or that our courts are powerless to do justice between litigants in this class of cases, pending the settlement of title in the Land Department, would be the announcement of a doctrine abhorrent to a sense of common justice. It would encourage the strong to override the weak; would place a premium upon greed and the use of force; and in many instances lead to bloodshed and crime. Such a state of affairs is to be avoided and the courts should not hesitate to invoke the powers inherent in them and lend their aid, in every way possible, in aid of justice by preventing encroachment upon the possessory rights of settlers, or by equitably adjusting their differences.'"

"We are accordingly of opinion that the laws of Congress interposed no obstacle to the jurisdiction of the Court of first instance, and that, instead of dismissing the case, it should have proceeded to an appropriate disposition of the asserted right of possession. (cases cited)"

Notwithstanding the pendency of a possessory action against it in the State Superior Court of California, the Irrigation District sought to invoke the jurisdiction of the Bureau of Land Management and displace the jurisdiction of the State Court. In the circumstances, the

Irrigation District's effort to invoke the jurisdiction of the Bureau of Land Management is proscribed by this Court's ruling in *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U.S. 683, 694 (1895):

> "The rule applicable here is no different from that which applies in any other case. When a defendant has by personal service or appearance once been brought into a court, having jurisdiction of the subject-matter, he cannot by his election oust the court of jurisdiction, or prevent the case from passing to judgment."

Assumption of jurisdiction by the Bureau of Land Management, in its quasi-judicial capacity, to hear and determine the complaint filed by the Irrigation District, despite knowledge of the pending suit in the State Court involving the same parties and the same subject matter, produced a conflict of jurisdiction between the Land Department and the State Court. In the circumstances, the determination of the Court of Appeals upholding the Land Department's jurisdiction is in conflict with the rule firmly established by this Court, that where a State and Federal Court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches will be left to determine the controversy without interferences from the other.[4]

The rule has been stated by this Court in *Harkrader* v. *Wadley*, 172 U.S. 148, 163, 164 (1898), as follows:

> "Two propositions have been so firmly established by frequent decisions of this court as to require only to be stated: * * * When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal matters."

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[4] *Morrow* v. *Superior Court in and for Kings County*, 48 P. 2d 188, 191, 9 Cal. App. 2d. 16 (D.C.A. 4th Dist. Calif., 1935)

This rule was further elaborated by this court in *Farmer's Loan & Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U.S. 51, 61 (1900), when it said:

> "The possession of the *res rests* the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of coordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraced the same subjects and persons.
>
> "• • • The rule has been declared to be of especial importance in its application to Federal and State Courts. (cases cited)"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17,092

May 25, 1961

JAMES DUGUID AND BERTHA V. DUGUID,
Appellants,
v.

RAYMOND R. BEST, as State Supervisor, Bureau of Land Management, WALTER E. BECK, as Manager, District Land Office, Bureau of Land Management, RICHARD J. LITTEN, Chief, Lands Adjudication Unit, Bureau of Land Management, and JOSEPH E. TAYLOR, Assistant Regional Solicitor, California Region, Bureau of Land Management, Department of the Interior,
Appellees.

Appeal from the United States District Court for the Northern District of California, Northern Division

Before CHAMBERS, JERTBERG and KOELSCH, Circuit Judges.

JERTBERG, Circuit Judge.

Appellants appeal from a summary judgment dismissing their complaint on the ground that there existed no genuine issue as to a material fact and that appellees were entitled to a judgment as a matter of law.

Jurisdiction of the district court is predicated on the alleged presence of a federal question, and upon Title 28 U.S.C.A. Section 1331, and such jurisdiction is not questioned on this appeal. This Court has jurisdiction to review the judgment under Title 28 U.S.C.A. Sections 1291 and 1294.

In their complaint filed in the district court appellants alleged: that they are the owners in possession and are entitled to the possession of a certain mine and mining location situate in the Lassen National Forest [public lands of the United States], County of Butte, State of California, known as "Clifford Mine", located July 5, 1936, and duly recorded in the official records of Butte County; that said mine and mining location contained a valuable deposit of gold bearing gravel; that said location was based upon discovery of gold and other valuable minerals within the limits thereof; and that they have been in possession of said mining claim and location ever since the date of location except as they were forcibly ousted from a portion thereof by Paradise Irrigation District, an irrigation district organized and existing under the laws of the State of California.

It further appears that on March 26, 1956, Paradise Irrigation District was granted a special use permit by the United States Forest Service, and right-of-way or easement to construct a dam and spillway at specified locations in the Lassen National Forest, a portion of which encroached upon the mining claim and location of appellants. This permit was granted "subject to all valid claims". Subsequent to the granting of the permit the Paradise Irrigation District, without the consent of appellants, entered upon, forcibly took possession of a portion of appellants' mining claim and location, and proceeded to construct a dam and spillway thereon. Thereupon appellants instituted an action against the irrigation district in the Superior Court of the State of California, in and for the County of Butte, on May 19, 1959, praying for damages in the sum of $30,000 for such taking, which action is pending and undetermined.

On February 1, 1960, the irrigation district filed in the District Land Office of the Bureau of Land Management of the Department of the Interior, at Sacramento, California, and with appellees, a complaint against the

appellants as a private contest, seeking an adjudication by the Bureau of Land Management of the validity of appellants' mining claim. This complaint was dismissed due to formal deficiencies.

Later in February, 1960, another complaint was filed by the irrigation district in the District Land Office of the Bureau of Land Management at Sacramento, California, and with appellees, against the appellants as a private contest, seeking an adjudication by the Bureau of Land Management of the validity of appellants' mining claim. Said complaint alleged that its special use permit entitled it to use the lands specified in its permit, that appellants were asserting an adverse claim, and that the lands described in appellants' mining claim were non-mineral in character and insufficient to constitute a discovery. Appellants alleged in their complaint filed with the district court that the filing of this second contest was with the aid and assistance of appellees. Appellants were ordered to appear before the Bureau of Land Management in this contest proceeding.

On March 16, 1960, appellants instituted their action in the district court, seeking to enjoin and restrain appellees from proceeding in any manner in connection with the alleged private contest complaint filed with the Bureau of Land Management by the irrigation district. It was alleged in the complaint that the filing of said private contest complaint was without statutory authority; that the pendency of said contest proceedings would enable the irrigation district to hold and use appellants' mining claim without compensation and thereby cause irreparable injury and subject appellants to a multiplicity of suits; that unless such proceedings be restrained appellants would be required to enter upon a long costly administrative proceedings; that appellants had no adequate remedy at law since said administrative proceedings and an appeal therefrom would take two years, during which period the appellants would be denied the

right to occupy and to mine their mining claim; that appellees were without jurisdiction to hear and determine the controversy; and that the controversy between the irrigation district and the appellants was entirely within the jurisdiction of the Superior Court of Butte County.

The private contest complaint of the irrigation district was attached as an exhibit to appellants' complaint. In this private contest complaint filed by the irrigation district it is alleged that appellants' mining claim is adverse to the special use permit; that the lands embraced within appellants' mining claim are non-mineral in character; that insufficient minerals occur in said land to constitute a discovery; and that the use by the irrigation district of land embraced within appellants' mining claim causes no damage to appellants. The irrigation district prayed that appellants' mining claim be declared null and void. Attached to the private contest complaint are the affidavits of the president of the irrigation district and the mining engineer employed by the irrigation district, which affidavits repeat by reference the allegations of the complaint.

Appellees filed no answer to the complaint filed by appellants in the district court. The motion for summary judgment was based on the pleadings and records filed in the case, and as grounds of said motion it is alleged: (1) that the Bureau of Land Management was authorized to determine in the private contest proceeding the validity or invalidity of appellants' mining claims; (2) that appellants have not exhausted their administrative remedies; and (3) that the Secretary of the Interior is an indispensable party.

The district court granted the appellees' motion for summary judgment and held that the complaint was insufficient in law and that the Bureau of Land Management was acting within its authority in proceeding to conduct the private contest instituted before it by the irrigation district.

Before giving specific consideration to appellants' contentions on this appeal, we deem it necessary to discuss the nature of the rights or interests of the appellants in the mining claim which they assert and seek to protect in the state action, and to analyze the extent of the controversy claimed to exist between appellants and the irrigation district.

A prospector has a statutory right to enter on public land in search of minerals, Title 30 U.S.C.A. § 22.[1] A prospector who has made no discovery which would entitle him to any possessory rights of his claim against the government nevertheless has some possessory rights against forcible fraudulent or clandestine intrusions while he remains in possession of his claim diligently working towards discovery. *Union Oil Co. v. Smith*, (1919), 249 U.S. 337. An extended discussion of the requirements of this doctrine, known as pedis possessio, is not required. It is sufficient to note that Congress has passed a statute recognizing this doctrine.[2]

---

[1] Title 30 U.S.C.A. § 22. Lands open to purchase by citizens

"Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

[2] Title 30 U.S.C.A. § 53. Possessory action for recovery of mining titles

"No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession."

Appellants, however, claim a greater right than that of a mere prospector. Appellants allege discovery of valuable minerals on land which is mineral in character. Accordingly they claim that right of exclusive possession which infures to the owner of a mining location which is perfected under the law but unpatented. Such an interest has been declared to be property in the fullest sense of that term. *Wilbur* v. *Krushnic*, (1929), 280 U.S. 306; *Iches* v. *Virginia-Colorado Development Corp.*, (1935), 295 U.S. 639; *United States* v. *Etcheverry*, (10 Cir. 1956), 230 F. 2d 193. If a prospector may assert a possessory interest cognizable in a court of law, a fortiori the owner of such a perfected mining claim may do so.

We are satisfied from our review of the authorities and the provisions of Section 53, Title 30 U.S.C.A. supra, that appellants resorted to the proper forum in instituting their action in the Superior Court of the State of California, in and for the County of Butte, against the irrigation district to recover damages for the alleged trespass of the irrigation district on the possessory interest of appellants in the mining claim. Under the express language of said Section 53 the paramount title of the United States to the land in which such mining claim lies is not affected by such lawsuit, and the rights of the parties to such lawsuit must be adjudged by the law of possession. We recognize that there is a dispute between the parties as to the nature of appellants' possessory interest. In the district court appellants alleged they are owners of a perfected claim, and on motion for summary judgment appellees assert that the claim of appellants was not perfected because of lack of discovery and the non-mineral character of the lands.

In exercising jurisdiction to determine the possessory interests as between appellants and the irrigation district, the state court may be required to determine the mineral or non-mineral character of the land and the

question of whether discovery has been made, where such a determination is necessary to settle the controversy before it. See *McLemore* v. *Express Oil Co.*, (1910), 158 Cal. 559; *Double Eagle Mining Co.* v. *Hubbard*, (1910), 42 Cal. App. 39. We agree with the view of the California courts that it is not improper for state courts to make such a determination but such determination affects only the possessory interests of the litigants and has no effect upon the paramount title of the government. See *Potter* v. *Randolph*, (1899), 126 Cal. 458; *Lightner Mining Co.* v. *Superior Court*, (1910), 41 Cal. App. 649.

The contentions urged by the appellants on this appeal are: (1) the court erred in concluding that the appellees had statutory authority to accept a private contest against appellants' mining claim; (2) the court erred in concluding that the mining claim of appellants was public land and therefore the right-of-way application of Paradise Irrigation District legally attached thereto; (3) the court erred in concluding that the approval of the said right-of-way by the Bureau of Land Management authorized occupancy of the mining claim of appellants by said Irrigation District; (4) the court erred in concluding that an adverse right in and to real property may be based in trespass; and (5) the court erred in granting appellees a summary judgment while there remained justiciable issues.

From our study of the record in the court below we have reached the conclusion that the validity of appellants' mining claim was not in issue before the district court. The effect of the conclusion reached by the district court was simply that the validity of appellants' mining claim could be properly adjudicated in the administrative proceedings initiated by the irrigation district by filing its contest complaint in the Sacramento office of the Bureau of Land Management, and that the Bureau of Land Management was authorized to hear and

conduct such proceedings. In our view, therefore, the district court did not conclude that the mining claim of appellants was public land or that the right-of-way application of the irrigation district legally attached thereto, nor did the district court determine that the approval of said right-of-way by the Bureau of Land Management authorized occupancy of the mining claim by the irrigation district, nor did the district court conclude that an adverse right in and to real property may be based on trespass.

The main question on this appeal is whether the district court erred in concluding that the appellees had authority to hear and determine the administrative proceedings initiated by the irrigation district.

Appellants "admit the Bureau of Land Management may, at any time on its own initiative, question the character of the land in a mining location or question the uses to which such land is being put." Such is undoubtedly the law. See *Cameron* v. *United States*, (1920), 252 U.S. 450. As stated in Cameron, pages 459-460:

> "By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department, is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved. [Citations omitted]
>
> "A mining location which has not gone to patent is of no higher quality and no more immune from attack and investigation than are unpatented claims under the homestead and kindred laws. If valid, it gives to the claimant certain exclusive possessory rights, and so do homestead and desert claims. But no right arises from an invalid claim of any kind. All must

conform to the law under which they are initiated; otherwise they work an unlawful private appropriation in derogation of the rights of the public.

"Of course, the Land Department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid, and, if it be found invalid, to declare it null and void."

As stated in their opening brief, "Appellants do, however, question the authority of the Bureau of Land Management to vest in a private person or corporation a power specially conferred upon the Government only. We can find no statute authorizing the transfer of this mantle of sovereignty from the shoulders of the Federal Government to those of a private person or corporation."

It is undisputed that the Congress has granted to the Secretary of the Interior general supervisory authority over public business relating to public lands, including mines.[3] Congress has also authorized the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, to make appropriate regulations to carry into execution the statutory provisions relating to public lands.[4] Pursuant to the purported authority, Title 43 U.S.C.A. § 1201, supra, the Commissioner of the Land Office, under the direction of the Secretary

[3] Title 5 U.S.C.A. § 485. "Duties of Secretary

"The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:

* * * *

"18. Public lands, including mines. * * *"

[4] Title 43 U.S.C.A. § 1201. "Power of Commissioner of Land Office. The Commissioner of the General Land Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for."

of the Interior, promulgated regulations which in pertinent parts provide, Title 43, Code of Federal Regulations, Section 221.51 et seq.:

"Subpart C - Contests and Protests

"§ 221.51 *By whom private contest may be initiated.* Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations in this part."

"Government Contests.

"§ 221.67 *Government contests.* The Government may initiate contests for any cause affecting the legality or validity of any entry or settlement or mining claim."

It is to be noted that under Section 221.67 the government may initiate a contest for any cause affecting the legality or validity of any entry or settlement or mining claim on public land. Patently the purpose of such regulation is designed to assist the Secretary of the Interior in supervising public business relating to public lands, including mines. Even in the absence of such regulation, there can be no question as to the power and authority of the Secretary of the Interior, under the grant of authority to supervise public business on public lands, including mines, to initiate through the subordinate Bureau of Land Management a contest in order to see "that valid claims on public land may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron* v. *United States*, supra.

Under Section 221.51 a person who claims title to or interest in public lands adverse to any other person claiming title to or interest in such land "may initiate proceedings to have the claim of title or interest to his claim *invalidated* for any reason not shown by the records of the Bureau of Land Management." [Italics added] By the express language of the regulation, a person who initiates such proceedings seeks only to have invalidated the claim of title or interest of the adversary party against the government. The adjudication is made not by the person who initiates the proceedings, but by authorized representatives of the United States. Under such regulation there is no transfer of the mantle of sovereignty from the shoulders of the government to those of a private person. We regard the private contest proceedings as a means or method which is designed to assist the Secretary of the Interior in carrying out his duties to protect the interests of the government and the public in public lands, in that by such method there may be called to the attention of the Bureau of Land Management invalid claims to title or interest in public lands, the invalidity of which does not appear on the records of the Bureau of Land Management and of which the Bureau may be without knowledge. If a claim of title to or interest in public land may be invalidated in a proceedings initiated by the government, we are unable to see why the same result may not be reached in a proceeding initiated by a private person.

We do not construe the provisions of Section 221.51 to authorize an adjudication on the superiority of possessory interests as between claimants. In our view, controversies between claimants of possessory interests on public lands must be determined by the courts. See Title 30 U.S.C.A. § 53, supra.

Since the purpose and end result of a private contest operate to protect the government against invalid claims of title to or interest in public lands, we are convinced

that such regulation is valid. It was promulgated pursuant to Title 43 U.S.C.A. § 1201, supra, under the power granted to the Secretary of the Interior by the provisions of Title 5 U.S.C.A. § 485, supra, to carry out his duties to supervise public business relating to public lands, including mines.

In their complaint in the district court to enjoin the appellees from conducting a private contest, appellants express great fear that unless they be enjoined the appellants will be denied the right to have their case tried in the state court action, and they will be deprived of their property without due process of law. We are unable to share such views. We find nothing in the record to indicate that the state court action has been stayed pending the termination of the contest proceedings. In the state court action appellants claim damages for invasion of their possessory rights, which, as indicated in the earlier part of this opinion, may exist as against the irrigation district regardless of the validity of appellants' mining claim as against the United States. If, as claimed by appellants, the irrigation district in initiating the private contest seeks to vex and annoy appellants by subjecting appellants to a multiplicity of actions, and to impair, interfere with, or defeat the jurisdiction of the state court, appellants' remedy, if any, lies in the state court which presumably has acquired jurisdiction over the irrigation district.

We agree with the conclusion reached by the district court from the records and documents before it that there was in fact no conspiracy between the appellees and the irrigation district, and that there existed in the record before it no genuine issue as to any material fact.

The judgment of the district court is affirmed.

(Endorsed) Opinion Filed May 25, 1961.

Frank H. Schmid, Clerk.

APPENDIX B

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

June 15, 1961

Charles L. Gilmore
Attorney at Law
301 Crocker-Anglo Bank Bldg.
Sacramento, California

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 17092 James Duguid v. Raymond Best was this day denied.

Pursuant to Rule 23, and unless stayed by the Order of the Court, a mandate of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Very truly yours,

Frank H. Schmid,
Clerk

(Form No. 7)

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Civil No. 8063

JAMES DUGUID AND BERTHA V. DUGUID,
Plaintiffs,

vs.

RAYMOND R. BEST, as States Supervisor, Bureau of Land Management; WALTER E. BEUK, as Manager, District Land Office, Bureau of Land Management; RICHARD J. LITTEN, Chief, Lands Adjudication Unit, Bureau of Land Management, and JOSEPH E. TAYLOR, Assistant Regional Solicitor, California Region, Bureau of Land Management, Department of the Interior,
Defendants.

MEMORANDUM AND ORDER

Presently before this Court is the motion of defendant, Taylor, for dismissal of this action as to him, and the motion of all defendants for summary judgment in their favor (Federal Rules of Civil Procedure, Rule 56).

The facts on which plaintiffs seek the relief prayed for are as follows: Plaintiffs are the owners of a mining claim, located upon public lands. Paradise Irrigation District (hereafter in this memorandum referred to as Paradise), under a permit from the Government, built a dam and spillway which encroached upon plaintiffs' claim. Plaintiffs instituted an action for damages against Paradise in the Superior Court of the State of California, in and for the County of Butte. Paradise then filed with the District Land Office of the Bureau of Land Manage-

ment at Sacramento, a private contest of plaintiffs' claim, which was dismissed because of certain formal deficiencies (See: 43 C.F.R. Sec. 221.54 and Sec. 221.56). Paradise contended that the contested land was non-mineral in character.

It is alleged here that defendants are officials of the Bureau of Land Management, that they have conspired and contrived with the agents of Paradise to harass and annoy plaintiffs without legal ground, and helped those agents to frame a second private contest complaint, which defendants then accepted and filed in an effort to deprive the State Court of jurisdiction in the aforesaid damage suit, and in furtherance of the conspiracy against plaintiffs.

From the affidavits submitted on behalf of defendants, and the absence of any counter-showing or claim on behalf of plaintiffs, it affirmatively appears that there was in fact no conspiracy: It would appear that certain of the defendants did advise and assist the attorneys for Paradise in framing a complaint to meet the formal requirements of 43 C.F.R., Sec. 221.54 and Sec. 221.56, and that this second complaint was then accepted and filed, but this does not per se create a conspiracy.

Plaintiffs brought suit in this Court for an injunction by which they seek to restrain defendants from proceeding in connection with the contest complaint filed by Paradise. A temporary restraining order was granted, on the posting of security by plaintiffs.

Plaintiffs concede that the United States, through the Bureau of Land Management, might institute proceedings seeking to void the claim. Plaintiffs, however, contend that no private contest may be instituted, except as provided by Title 43 U.S.C., Sec. 185. Plaintiffs further contend that defendants are acting without authority, and

that there is, for that reason, no requirement that plaintiffs exhaust their administrative remedies.

There is no statutory language, cited by the parties, or found by the Court, which expressly authorizes and regulates the administrative hearing of claim contests. Title 43 U.S.C., Sec. 185, however, assumes that a successful contest has been made, and grants certain rights to the successful contestant. The power of the Bureau of Land Management to consider contests, and itself to question the validity of claims located upon the public lands, is derived from the general authority of the Bureau over the public lands (See: Title 43 U.S.C., Sec. 1201; 43 C.F.R., Sec. 221.51, et seq.; Cameron vs. United States, 252 U.S. 450; Standard Oil of California vs. United States, 107 F. 2d 402).

Plaintiffs concede that the Bureau might have initiated a contest itself. Clearly, such an inquiry might have been commenced as the result of a protest filed by Paradise (See: Cameron vs. United States, supra). If the Director of the Bureau may go this far, it is surely not a usurpation of power for him to provide by regulation that any person who claims an interest in land adverse to a claimant may initiate a private contest of the claim (Title 43 U.S.C., Sec. 1201). The Director has so provided (43 C.F.R., Sec. 221.51). It, therefore, follows that defendants had authority to entertain the private contest initiated by Paradise. Plaintiffs do not deny that Paradise claims an interest adverse to plaintiffs' claim.

As the motion of defendants for summary judgment in their behalf must be granted, there is no need to consider the motion of defendant, Taylor, for dismissal of the action as to him.

It Is, Therefore, Ordered that the motion of defendants, for summary judgment in their favor, be, and it is, hereby granted.

It Is Further Ordered that the temporary restraining order made by this Court on March 16, 1960, be, and it is, hereby vacated and dissolved;

And It Is Further Ordered that defendants prepare a form of judgment, and all other documents necessary for the complete disposition of this case, in accordance with this memorandum and order, and lodge such documents with the Clerk of this Court pursuant to the applicable rules and statutes.

Dated: June 10, 1960.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed June 10, 1960.

APPENDIX D

In the District Court of the United States for the Northern District of California, Northern Division

Civil No. 8063

JAMES DUGUID and BERTHA V. DUGUID,
Plaintiffs,

vs.

RAYMOND R. BEST, as State Supervisor, Bureau of Land Management; WALTER E. BECK, as Manager, District Land Office, Bureau of Land Management; RICHARD J. LITTEN, Chief, Lands Adjudication Unit, Bureau of Land Management, and JOSEPH E. TAYLOR, Assistant Regional Solicitor, California Region, Bureau of Land Management, Department of the Interior,
Defendants

JUDGMENT

The Defendants in the above-entitled action, being represented by Lynn J. Gillard, United States Attorney, by and through Floyd R. Mitzner, Assistant United States Attorney, filed a Motion for Summary Judgment on April 7, 1960. Plaintiffs, being represented by Attorney Chas. L. Gilmore, filed a Memorandum of Authorities in reply to said Motion. Defendants subsequently filed Points and Authorities in answer to Plaintiffs' Memorandum and the Motion for Summary Judgment was submitted to the Court on June 10, 1960.

The Court having considered said pleadings and having made and entered its Findings of Fact and Conclusions of Law; now, therefore,

It is Hereby Ordered, Adjudged and Decreed that Defendants' Motion for Summary Judgment is hereby granted.

It Is Further Ordered, Adjudged and Decreed that the temporary Restraining Order made by this Court on March 16, 1960, is hereby vacated and dissolved.

It Is Further Ordered, Adjudged and Decreed that Defendants shall have Judgment for costs of suit incurred herein.

Dated: June 21, 1960.

/s/ SHERRILL HALBERT,
United States District Judge.

Certificate of Service by Mail attached.
Lodged June 16, 1960.

[Endorsed]: Filed June 21, 1960.
Entered June 22, 1960.

APPENDIX E

STATUTES INVOLVED

R. S. Sec. 2319; Feb. 25, 1920, c. 85, Sec. 1, 41 Stat. 437; 30 U.S.C. Sec. 22.:

Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

R.S. Sec. 2322; 30 U.S.C. Sec. 26.:

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. . . .

Act of March 3, 1881, c. 140, 21 Stat. 505; 30 U.S.C. Sec. 32.:

If, in any action brought pursuant to section 30 of this title, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

R.S. Secs. 2329, 2331; Mar. 3, 1891, c. 561, Sec. 4, 26 Stat. 1097; 30 U.S.C. Sec. 35.:

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead purposes.

R.S. Sec. 2330; Mar. 3, 1891, c. 561, Sec. 4; 26 Stat. 1097; 30 U.S.C. Sec. 36.:

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

R.S. Sec. 2332; 30 U.S.C. Sec. 38.:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under sections 21-24, 26-30, 33-48, 50-52, 71-76 of this title, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

R.S. Sec. 910; 30 U.S.C. Sec. 53.:

No possessory action between persons, in any Court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

APPENDIX F

CHAS. L. GILMORE
301 Crocker-Anglo Bank Building
Sacramento 14, California
GIlbert 3-7028
Attorney for Plaintiffs.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF BUTTE

Civil 34327

JAMES DUGUID AND BERTHA V. DUGUID,
Plaintiffs

vs.

PARADISE IRRIGATION DISTRICT, a PUBLIC CORPORATION,
Defendant

SECOND AMENDED COMPLAINT

Come now plaintiffs above named, and file this as and for their Second Amended Complaint and allege:

I

That plaintiffs at all times mentioned herein have been and are now husband and wife;

II

That defendant is a public corporation and an irrigation district organized and existing within the State of California and under the laws thereof with its principal place of business within the County of Butte, State of California;

III

That plaintiffs are now and ever since the 3rd day of August, 1936 the owners in possession, except as to the dispossession by defendant herein, and entitled to the possession of all that certain placer mining location or claim situate in the County of Butte, State of California, known as the "Clifford Mine" located July 5, 1936 and of record and as described in the Notice of Location thereof recorded in Volume 177 of Official Records, at page 106, records of said Butte County, and amended February 24, 1954 by Amended Location Notice recorded March 30, 1954 in Vol. 571 of Official Records, at page 457, records of said Butte County; that a certified copy of each of the said location notices above set forth were filed with the first Amended Complaint herein and said certified copies are hereby referred to and made a part hereof for a more definite statement of their respective contents; that the said Clifford Placer Mining Claim contains a valuable deposit of gold bearing gravel; that plaintiffs have paid all taxes levied or assessed against said premises for more than five (5) years prior to the filing of the Complaint herein, and ever since the assessment year of 1936-37 plaintiffs have done and performed the required annual labor on said claim and each year have duly recorded the verified proof of labor in the office of the Recorder of said Butte County.

IV

That said mining claim of plaintiffs was, prior to the seizing and taking possession thereof by defendant hereinafter set forth, traversed by that said perennial stream locally known as "Mosquito Creek" which creek had a continuous flow of water the year round to and across said mine and mining claim to which water plaintiffs herein had a riparian right.

V

That prior to the seizing and taking possession of the said Clifford Placer Mining Claim of plaintiffs by defendant as hereafter set forth, plaintiffs had an access road from the said premises to the county road known locally as the "Coufolene Road" which had been used by plaintiffs for and during the entire period since the original location of said placer mining claim.

VI

That at some time, the exact date of which is unknown to plaintiffs but within the three (3) years immediately preceding the filing of the original complaint herein, according to the best knowledge, information and belief of plaintiffs, defendant began the construction of a certain dam, reservoir and appurtances which came eventually to occupy a portion of the said place mining claim; and said defendant, will knowing the ownership of said mining claim of plaintiffs, willfully and without due or any regard for the rights of plaintiffs, forcibly seized and took possession of said Clifford Placer Mining Claim and in disregard of rights of plaintiffs proceeded to construct a portion of a dam thereon, together with a reservoir, a private access road for the use of defendant, and other appurtances, and proceeded with the further construction of fences to prohibit the entry of any person to said dam and appurtances, and including the spillway thereon; that construction has finally excluded plaintiffs from the right to the use of their roadway and right to the area occupied by the dam and spillway on the premises of plaintiffs and seized and took possession of the entire flow of said Mosquito Creek and turned the same into the reservoir of defendant, thereby rendered the premises of plaintiffs valueless for mining;

VII

That from the date of the commencement of work in the area plaintiffs protested to the agents of the defendant and to defendant itself; but at all times were assured by defendant that proper provisions had been made to protect the interests of plaintiffs and that certain monies had been set aside to reimburse plaintiffs; that plaintiffs believed and relied upon the statements and promises;

VIII

That the said defendant preparatory to the construction of the said dam and its appurtenances did on December 21, 1956 file its application for a right-of-way therefor in the Office of the Bureau of Land Management, Department of the Interior at Sacramento, California, which said office and bureau had and has jurisdiction over the public lands proposed to be taken by said structures and its appurtenances including reservoir area, and which said application was given Sacramento Serial No. 053216, to which official record reference is hereby made for a more complete description of said filing. That the said right-of-way was approved April 2, 1959 by the said Bureau of Land Management; that in said application for right-of-way, defendant did not advise nor inform said Bureau of Land Management that the said proposed right-of-way would actually and in fact take and did take a portion of aforesaid Clifford Placer Mining Claim of plaintiffs;

IX

That the exact date of completion of said dam, spillway and reservoir together with the appurtenances, is unknown to plaintiffs and plaintiffs have no knowledge, information or belief sufficient to enable them to fix any date of completion and cessation of labor thereon; that plaintiffs are informed and believe and upon such information and belief allege that work was continuing on said structures

with a crew of workmen as late as the month of March, 1959;

X

That at no time prior to the commencement of this action or at all has defendant instituted any action in eminent domain against plaintiffs or the said property of plaintiffs described herein to acquire any portion thereof nor has defendant ever made any deposit in court or elsewhere to pay plaintiffs any sum whatever for the forcible taking and seizure of the property of plaintiffs described herein;

XI

That until work has been completed plaintiffs were and are unable to calculate the full measure of the taking and seizure of their property including the seizure of their riparian right to water of said Mosquito Creek and the barring of their right of entry and egress to and from the public highway aforesaid.

XII

That following the immediate breakdown of negotiations and total absence of good faith on the part of defendant to return the possession of said premises so forcibly seized and converted to the sole use and benefit of defendant, or to pay therefor, plaintiffs did on March 13, 1959 serve upon defendant a verified written demand for payment for the taking thereof, which demand was in the sum of $30,000 and has not been paid nor payment offered by said defendant.

XIII

That the reasonable value of the premises herein described so seized, taken and possessed by defendant is the sum of $30,000.

WHEREFORE, plaintiffs pray judgment against defendant:

1. For the reasonable value of the land and premises so seized and taken in the sum of $30,000; or in the alternative;
2. Damages in the sum of $30,000;
3. For plaintiffs cost of suit.

Chas. L. Gilmore
Attorney for Plaintiffs.

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

Chas. L. Gilmore, being first duly sworn, deposes and says:

That he has read the above and foregoing Second Amended Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and that as to those matters, that he believes it to be true; that plaintiffs are absent from the County of Sacramento, where affiant has his office, that affiant is attorney for plaintiffs, for which reason affiant makes this affidavit.

Chas. L. Gilmore

Subscribed and sworn to before me
this 20th day of November, 1959.

Helen S. Gilmore

[SEAL]

Notary Public in and for the County
Sacramento, State of California.

APPENDIX G

United States Department of the Interior, Bureau of Land Management, Land Office, Sacramento, California

Contest No. .....

PARADISE IRRIGATION DISTRICT, a State Agency of the State of California,
Contestant,

JAME DUGUID and BERTHA V. DUGUID,
Contestees.

Involving the DuGuid-Clifford Placer Mining Claim

COMPLAINT

In accordance with Sections 221.51 to 221.66 of Title 43 of the Code of Federal Regulations, the Paradise Irrigation District located at 759 Birch Street, Paradise, California, a State agency of the State of California, brings this contest against the Contestees named above, and for cause of action alleges:

I.

That this proceeding is not collusive or speculative but is instituted and will be diligently pursued in good faith.

II.

That the lands hereinafter described are public lands of the United States and are embraced within the boundaries of the Lassen National Forest, and so far as known to the Contestant there are no other proceedings pending for the acquisition of title to or an interest in the hereinafter-described lands.

III.

That Contestant on March 26, 1956, in consideration of the sum of $10,720.00 paid to the United States of America, was granted a Special Use Permit by the United States Department of Agriculture, to use certain land located in Butte County and within the Lassen National Forest, more particularly described as $SW^1_4NW^1_4$ (Lot 2), Section 18, T. 23 N., R. 4 E., M. D. M. identified as Parcel No. 4 and $S^1_2NE^1_4NW^1_4$ and $SE^1_4NW^1_4$, Section 12, T. 23 N., R. 3 E., M. D. M. identified as Parcel No. 2, for the purpose of constructing a dam and reservoir for the storing of agricultural and domestic water for the City of Paradise, California (copy of said Special Use Permit being annexed hereunto marked "Exhibit A" and made a part of this Complaint). That thereafter on April 2, 1959, the United States Department of Interior, Bureau of Land Management, executed an easement, Serial No. Sacramento 053246, in favor of Contestant for the purposes hereinabove mentioned (copy of said easement being annexed hereunto marked "Exhibit B" and made a part of this Complaint).

IV.

That the above-named Contestee on or about May 19, 1959, more than three years after Contestant received its Special Use Permit and after having completed construction of its reservoir and dam and after receiving an easement as described in paragraph III, filed a Complaint in the Superior Court of Butte County naming the Contestant herein as Defendant and alleging that Contestees are the owners of certain mining location situated in Butte County, California, known as the DuGuid-Clifford Placer Mining Claim located August 4, 1936, within Section 18, Township 23 North, Range 4 East, M. D. M., consisting of 40 acres or more; and that said alleged claims are described in Volume 177 at page 106 of

Official Records of Butte County, California. That Contestees in their Complaint and demand filed in the Superior Court of Butte County allege that Contestant in constructing its dam occupied approximately 3.7 acres of Contestee's mining claim removing 55,000 cubic yards of gold bearing gravel and that Contestees have suffered damages in the sum of $30,000.00. That the portion of said claim which Contestees allege Contestant encroached upon are acres within the Lassen National Forest and within the area described in Contestant's easement as set forth in Paragraph III.

V.

That Contestant is, therefore, informed and believes that the above-named Contestees assert the ownership of the above-named unpatented placer mining claim adverse to Contestant's interest as evidenced by the above-mentioned Special Use Permit and Easement granted to Contestant by the United States and that the Contestees' address is: James DuGuid and Bertha V. DuGuid, 145 Monte Cresta Ave., Oakland 11, California.

VI.

Contestant charges separately and collectively that:

(a) The lands described in Contestees' alleged placer claim are non-mineral in character; and

(b) Insufficient mineral occur in Contestees' alleged DuGuid-Clifford Mining Placer Claim to constitute a discovery.

(c) That the alleged claim of Contestees is invalid; that Contestees are claiming possession of a portion of the Lassen National Forest under the guise of an illusory mining claim and that Contestants right to use and enjoy said lands for dam and reservoir purposes as granted by the United States Department of Agriculture and United

States Department of Interior is valid and is not causing damages to Contestees in any way.

Wherefore, Contestant requests that it be allowed to prove its allegations and that said alleged mining claim or claims be declared nul and void.

Notice

This Complaint is filed in the Sacramento Land Office, Bureau of Land Management, Room 1000, California Fruit Building, 4th and J Streets, Sacramento 14, California. Papers shall be sent to Minasian & Minasion, 1979 Bird Street; Oroville, California, attorneys for Contestant, for service on the contestant.

Unless contestees file an answer hereto in such office within thirty (30) days after service of this notice, the allegations of the Complaint will be taken as confessed.

Dated: February 9, 1960.

MINASIAN & MINASIAN,
/s/ D. H. MINASIAN,

Attorneys for Contestant, Paradise Irrigation District.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 349

JAMES DUGUID and BERTHA V. DUGUID,
PETITIONERS

v.

RAYMOND R. BEST, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, 12-23) is reported at 291 F.2d 235.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1961. A timely petition for rehearing was denied on June 15, 1961. The petition for a writ of certiorari was filed on August 23, 1961. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Interior has authority to complete an administrative proceeding to determine whether the petitioners had established a valid mining claim against the United States on public land, notwithstanding the fact that they had previously instituted a possessory action in a state court against a competing interest in the same land.

STATUTES INVOLVED

Revised Statutes, section 441, as amended, 5 U.S.C. 485, provides in pertinent part as follows:

> The Secretary of the Interior is charged with the supervision of public business relating to the following subjects and agencies:
>
> * * * * *
>
> 4. Bureau of Land Management.
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> * * * * *
>
> 13. Public lands, including mines.

Revised Statutes, section 910, as amended, 30 U.S.C. 53, provides:

> No possessory action between persons, in any court of the United States, for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession.

STATEMENT

This action was brought in federal district court to enjoin the respondents, who are subordinate officials of the Department of the Interior, from conducting an administrative proceeding. The proceeding, referred to as a "contest," was to determine the validity of petitioners' mining claim on public land in Lassen National Forest, California.

The petitioners alleged in the district court that they are the owners of a mining claim located in 1936 and duly recorded in the records of Butte County, California. The mining location is alleged to contain a valuable deposit of gold-bearing gravel. In March 1956, Paradise Irrigation District was granted a special use permit by the United States, "subject to all valid claims," to construct a dam and spillway at specified locations in Lassen National Forest. A portion of the irrigation district construction covered an area claimed by the petitioners in their mining location (Pet. 3).

The petitioners instituted an action against the irrigation district in the Superior Court of the State of California in May 1959, asking $30,000 damages as the value of th land "seized, taken and possessed" by the irrigation district (Pet. App. F, p. 38). In February 1960, the irrigation district filed in the Bureau of Land Management, Department of the Interior, at Sacramento, California, a complaint seeking an administrative determination of the validity of the petitioners' mining claims. In March 1960, the petitioners instituted this action against

local officials of the Department of the Interior in the district court to enjoin the administrative contest.

The district court granted the respondents' motion for summary judgment and held that the Bureau of Land Management was acting within its authority in proceeding to conduct the private contest instituted before it by the irrigation district. The court of appeals affirmed, holding that the validity of the mining claim was not at issue in this case, and that the Bureau of Land Management had authority to hear and determine its validity as against the United States whether it did so at the instigation of a private party or on its own initiative. In a dictum, the court of appeals stated "that it is not improper for state courts to make such a determination [of whether there had been a valid mineral discovery] but such determination affects only the possessory interests of the litigants and has no effect upon the paramount title of the government." (Pet. App. A, p. 18).

ARGUMENT

1. The purpose of the administrative contest was to determine whether the claimants, the petitioners here, had made a valid mineral discovery on the public lands such as would give the claimants the exclusive right of possession or the right to a patent. R.S. 441, as amended, 5 U.S.C. 485; *Cameron* v. *United States*, 252 U.S. 450; see also R.S. 2322, 30 U.S. 26; R.S. 2319, as amended, 30 U.S.C. 22; R.S. 2325, as amended, 30 U.S.C. 29. The Department of the

Interior is the proper tribunal to determine whether there has been a valid mineral discovery and whether there has been the requisite compliance with the mining laws of the United States. *Cameron* v. *United States*, *supra*; *Catholic Bishop of Nesqually* v. *Gibbon*, 158 U.S. 155, 166-167; *Steel* v. *St. Louis Smelting Co.*, 106 U.S. 447, 450-451.

Assuming, *arguendo*, that it was appropriate for the petitioners to bring their action for damages under R.S. 910, 30 U.S.C. 53, in a state court,[1] the pendency of the suit over rights of possession between individuals does not preclude the Department of the Interior from determining whether a mining claimant has made a valid mineral discovery and complied with the mining laws sufficiently to give the claimant a right in public lands against the United States. The California courts take the view that suits in state courts over possessory rights between private litigants in no manner interfere with subsequent determination by the Department of the Interior as to which of the litigants is entitled to receive title to the land from the United States. See *Potter* v. *Randolph*, 126 Cal. 458, 58 Pac. 905. Indeed, if the private litigation were construed to affect the title of the United States, the suit would be beyond the

[1] Although we have found no cases so stating, it is arguable that "any court of the United States" used in R.S. 910, 30 U.S.C. 53, refers to federal courts. Cf. *Minnesota* v. *United States*, 305 U.S. 382, 389. The section was originally contained in that chapter of the Revised Statutes dealing with evidence in federal courts. It was codified until recently in Title 28, United States Code. (See 28 U.S.C. 690, 1946 ed.)

jurisdiction of the state courts. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226.

None of the cases on which petitioners rely involves the authority of the Department of the Interior to determine the validity, as against the United States, of a mining claim or other interest in the public domain. *Gauthier* v. *Morrison*, 232 U.S. 452, recognizes the distinction between the right of private parties to litigate for possession in the state courts and the functions of the Secretary to administer the public land laws. The Court specifically noted that "no interference with [the Land Department] or usurpation of its functions was here sought or involved." (232 U.S. at p. 461.) *Last Chance Mining Co.* v. *Tyler Mining Co.*, 157 U.S. 683, is concerned with the question of whether there was estoppel by judgment from a prior judgment in a state court action authorized by federal statute which would prevent a relitigation of the same question in a later suit in federal court. Again the Court recognizes the difference between private litigation and litigation between a claimant and the federal government. Of the latter the Court said (157 U.S. at p. 694): "There is no provision in the statute for an action of this kind simply against the government. An applicant for public lands cannot have his right thereto as against the government determined by the courts in a suit against the latter." Neither *Hawkrader* v. *Wadley*, 172 U.S. 148, nor *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U.S. 51, involves public lands or the Department of the Interior. The language quoted

by petitioners (Pet. 7) from *Wilbur* v. *United States*, 280 U.S. 306, 316, is not in point, because it related to land that contained valuable mineral deposits. Here, however, the purpose of the administrative contest is to determine precisely that issue, *i.e.*, whether this land contains such deposits.

In summary, the litigation in the state court does not affect and could not be *res judicata* on the issues before the Department of the Interior. The Ninth Circuit has correctly held that the Department of the Interior, and respondents as officers thereof, have authority to hear and determine the administrative proceedings initiated by the irrigation district. It is, therefore, no basis for enjoining respondents from continuing with these proceedings that an action over possessory rights is pending in the state court.

2. While we thus believe that the decision below in this case is correct, we invite the Court's attention to the subsequent decision of the Ninth Circuit in *Humboldt Placer Mining Co.* v. *Best*, 293 F. 2d 553. In the *Humboldt* case, the court below held that the filing of an action by the United States to condemn public lands, in which mineral claims were asserted, barred the Secretary of the Interior from conducting an administrative proceeding, instituted after the condemnation suit had been filed, to determine the validity of such claims. The government will file a petition for certiorari in the *Humboldt* case.

The decision in *Humboldt* may be distinguished on the ground that there the judicial and administrative proceedings both involved the federal government, whereas in the present case the judicial proceedings

involve only private parties. Moreover, the United States had no connection with the institution of the judicial proceedings in *Humboldt*, whereas here it filed the condemnation suit. In view of the related issues involved in the two cases, however, the Court may deem it appropriate to defer ruling upon the present petition until it considers the petition in *Humboldt*.

CONCLUSION

The petition for a writ of certiorari should be denied; the Court, however, may wish to defer ruling on it until it considers the petition to be filed in the *Humboldt* case.

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